

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO**

In re:

THE FINANCIAL OVERSIGHT AND
MANAGEMENT BOARD FOR
PUERTO RICO,

As representative of

THE COMMONWEALTH OF
PUERTO RICO, THE EMPLOYEE'S
RETIREMENT SYSTEM OF THE
GOVERNMENT OF THE
COMMONWEALTH OF PUERTO
RICO, AND THE PUERTO RICO
PUBLIC BUILDINGS AUTHORITY,

Debtors.

PROMESA

Title III

No. 17 BK 3283-LTS

(Jointly Administered)

UNSWORN STATEMENT OF DR. LEONARDO GIACCHINO, PH.D.

Dated: June 15, 2021

I. BACKGROUND

I, **Leonardo Giacchino, Ph.D.**, pursuant to the provisions of 28 U.S.C. § 1746, declare as follows:

(1) I currently hold the position of Partner at Solutions Economics, LLC in Bethesda, MD.

I have worked as a consultant in the milk industry in Puerto Rico since the beginning of 2003. I have testified as an expert on many occasions in Federal Court in Case 04-1840 (DRD), “Vaquería Tres Monjitas, Inc. and Suiza Dairy Inc. v. Myrna Comas-Pagan, in her official capacity as Secretary of Agriculture of the Commonwealth of Puerto Rico, and José Pantojas López, in his official capacity as Administrator of the Milk Industry Regulatory Office of the Commonwealth of Puerto Rico.”

(2) On July 13, 2007 the District Court issued an Amended Opinion and Order Granting Preliminary Injunction (Dkt. No. 480), which was later amended on September 23, 2013 (Dkt. No. 2289). The Court held that the Commonwealth, through one of its instrumentalities, had performed a regulatory taking in violation of Suiza Dairy’s Constitutional rights.

(3) One of the remedies to resolve the violation was the establishment of a regulatory accrual, a regulated market compensation mechanism for the debt owed to the fresh milk processing plants, Suiza Dairy Inc (“Suiza”) and Vaquería Tres Monjitas (“VTM”), on account of said taking.

(4) As part of this case, an Experts’ Agreement was reached on August 26, 2008 and filed at Dkt. 1003 in Civil Case No. 04-1840. The Experts’ Agreement determines the methodology for the calculation of the regulatory accrual (among other things). I was one of the experts to draft, participate and sign this Experts’ Agreement.

- (5) The parties came to an agreement on October 29, 2013, which was signed and filed with the Court (Dkt. 2322 of Civil Case No. 04-1840, “Settlement Agreement”). The Settlement Agreement was approved and adopted into law by the Court in the Judgment of November 6, 2013 (Dkt. 2351 of Civil Case No. 04-1840, “Judgment”). Part of the Settlement Agreement was the determination of the official amount of regulatory accrual due to the fresh milk processing plants. I carried out the calculations to determine the amount of regulatory accrual owed to each plant which was incorporated into the Settlement Agreement and the Judgment.
- (6) Since the formalization of the Settlement Agreement and Judgment, I have been monitoring the payments made by the milk consumers of Puerto Rico, through their purchases of fluid milk, and by the government of Puerto Rico to Suiza and VTM towards the regulatory accrual. As a regulatory expert in the milk industry in Puerto Rico, I have filed annual reports with the milk regulator, ORIL, describing the status of the regulatory accrual collected. The last report filed was on January 5, 2021.¹
- (7) The Disclosure Statement proposed by the Commonwealth of Puerto Rico, which incorporates a Plan of Adjustment, seeks to discharge the debt owed to Suiza as part of the regulatory accrual to be paid directly by the Commonwealth with a distribution of only 50% of the debt owed.
- (8) Neither the Disclosure Statement nor the Plan of Adjustment characterize the debt as a regulatory taking.

¹ Giacchino, Leonardo (2021): “Regulatory Accrual Collected by Suiza Dairy as of December 31, 2019,” January 5 (in Spanish). A copy of the Report is attached as an Exhibit to the Objection.

(9) As explained in more detail herein-below, the debt owed to Suiza for the part of the regulatory accrual to be paid directly by the Commonwealth, is incorrectly listed in the Disclosure Statement and Plan of Adjustment as to amount.

(10) I have verified the documents submitted in support of the Objection and certify that to the best of my knowledge they are accurate.

II. GOVERNMENT PAYMENTS TO DATE

(11) As part of the 2013 Settlement Agreement, the Government of Puerto Rico agreed to pay \$95 million on behalf of the Puerto Rico consumers.² The portion of this amount to be paid to Suiza is 72.310318% and the portion of this amount to be paid to Vaquería Tres Monjitas (VTM) is 27.689682%, based on each plant's share of the total regulatory accrual amount owed at the time of signing the Settlement Agreement. These allocation factors result in an amount to be paid to Suiza of \$68,694,802.10 and an amount to be paid to VTM of \$26,305,197.90.

(12) The payments made by the Government of Puerto Rico to the processing plants to date are shown in **Table 1** below. The total paid by the Government of Puerto Rico to both plants is \$33 million, which leaves a remaining balance of \$62 million.

Table 1: Payments Made by Government of Puerto Rico

Payment Date	Total Payment	Payment to Suiza	Payment to VTM
2/4/2015	\$ 16,000,000.00	\$ 11,569,650.88	\$ 4,430,349.12
9/6/2016	\$ 3,000,000.00	\$ 2,160,000.00	\$ 840,000.00
11/7/2016	\$ 3,000,000.00	\$ 2,160,000.00	\$ 840,000.00
4/11/2017	\$ 3,000,000.00	\$ 2,160,000.00	\$ 840,000.00
7/26/2017	\$ 3,000,000.00	\$ 2,160,000.00	\$ 840,000.00
6/12/2018	\$ 3,000,000.00	\$ 2,160,000.00	\$ 840,000.00
10/22/2020	\$ 2,000,000.00	\$ 1,000,000.00	\$ 1,000,000.00
Total to Date	\$ 33,000,000.00	\$ 23,369,650.88	\$ 9,630,349.12

² Dkt. 2322 of Civil Case No. 04-1840, Clause 14.

- (13) At present, Suiza is owed \$45,325,151.22; the amount to be paid as of 2013 of \$68,694,802.10 minus \$23,369,650.88 paid by the Puerto Rico Government to date. VTM is owed \$16,674,848.78; the amount to be paid as of 2013 of \$26,305,197.90 minus \$9,630,349.12 paid by the Puerto Rico Government to date. Of the remaining balance of \$62 million to be paid to the plants, the portion owed to Suiza (\$45,325,151.22) represents 73.105083% of the total, more than the Settlement Agreement allocation factor of 72.310318%.
- (14) This discrepancy is largely due to the October 2020 payment, in which the Government paid \$1,000,000 each to both Suiza and VTM, an allocation of 50% to each plant. This allocation is not in compliance with the Judgment in Federal Court, which indicates that Suiza should have received 72.310318% of a total payment by the Government and VTM 27.689682%.³

III. SOLUTIONS FOR THE GOVERNMENT OF PUERTO RICO TO BE IN COMPLIANCE WITH THE JUDGMENT IN FEDERAL COURT

- (15) If the Government of Puerto Rico is to pay 50% of the remaining \$62 million balance, a sum of \$31 million, to allocate this amount using the Court allocation factors would continue the imbalance simply because one payment was made by the Government of Puerto Rico with an improper allocation. There are three possible ways to rectify this issue.

³ Before the October 2020 payment, the Government of Puerto Rico also underpaid Suiza in earlier payments based on erroneous rounding of the 72.310318% allocation factor. The first payment in **Table 1** was correctly allocated. The next five payments (with totals of \$3 million, \$2.16 million to Suiza) were incorrectly allocated 72% to Suiza, not 72.310318%. This results in an underpayment to Suiza of \$9,309.54 per payment, or a total of \$46,547.70. These amounts are taken into consideration in the solutions below in order to reach mathematical exactitude.

Solution 1

- (16) The first potential solution is illustrated in **Table 2** below. Rows (a), (b), and (c) show the original planned allocation of the government payments: \$68,694,802.10 to Suiza and \$26,305,197.90 to VTM out of a total of \$95 million. Row (d) shows the current amounts paid by the Government to each plant: \$23,369,650.88 to Suiza and \$9,630,349.12 to VTM for a total of \$33 million. Row (e) shows that these payments represent an allocation factor of only 70.817124% to Suiza, below the Federal Court allocation factor of 72.310318%.

Table 2: Proposed Allocation of Future Government Payments

Concept		Total	Suiza	VTM
Total Scheduled Payments by Government	(a)	\$ 95,000,000.00		
Official Allocation to Each Plant	(b)	100%	72.310318%	27.689682%
Total Scheduled Payments to Each Plant	(c)=(a)•(b)	\$ 95,000,000.00	\$ 68,694,802.10	\$ 26,305,197.90
Total Paid by Government to Date	(d)	\$ 33,000,000.00	\$ 23,369,650.88	\$ 9,630,349.12
Percent Paid to Each Plant to Date	(e)=(d) _{plant} /(d) _{total}		70.817124%	29.182876%
Total Yet to be Paid to Each Plant	(f)=(c)-(d)	\$ 62,000,000.00	\$ 45,325,151.22	\$ 16,674,848.78
50% of Total Yet to be Paid	(g)=(f)•50%	\$ 31,000,000.00		
Total to be Paid by Government with 50% Agreement	(h)=[(d)+(g)]•(b)	\$ 64,000,000.00	\$ 46,278,603.52	\$ 17,721,396.48
Remaining to be Paid to Each Plant with 50% Agreement	(i)=(h)-(d)		\$ 22,908,952.64	\$ 8,091,047.36
Amount for Each of 5 Equal Installments	(j)=(i)/5		\$ 4,581,790.53	\$ 1,618,209.47

- (17) Row (f) shows the total yet to be paid of the original \$95 million of planned payments: \$45,325,151.22 to Suiza and \$16,674,848.78 to VTM for a total of \$62 million. If the Government agrees to pay 50% of the remaining \$62 million, the resulting additional payments by the Government will amount to \$31 million, as shown in row (g). Summing the \$33 million already paid and the \$31 million yet to be paid results in total payments by the Government of \$64 million. Based on the Court allocation factors of 72.310318% for Suiza and 27.689682% for VTM, Suiza should be paid \$46,278,603.52 of this \$64 million and VTM should be paid \$17,721,396.48, as shown in row (h).

- (18) Subtracting the \$23,369,650.88 already paid to Suiza by the Government from the total of \$46,278,603.52 to be paid to Suiza results in \$22,908,952.64 which must still be paid to Suiza, shown in row (i). This represents five equal installments of \$4,581,790.53. Subtracting the \$9,630,349.12 already paid to VTM by the Government from the total of \$17,721,396.48 to be paid to VTM results in \$8,091,047.36 which must still be paid to VTM, shown in row (i). This represents five equal installments of \$1,618,209.47.

Solution 2

- (19) Another possible solution which results in Suiza receiving its Court allocation amount out of the total paid is that the Government deduct the amount which VTM has been paid in excess from payments to be made as part of the POA – Class 50 to VTM. If the payments received by Suiza to date of \$23,369,650.88 were to represent 72.310318% of a hypothetical total amount paid by the Government to the plants, 100% of this amount would be equal to \$32,318,556.36. The corresponding payment to VTM would be \$8,948,905.48 ($= \$32,318,556.36 - \$23,369,650.88$). Since VTM has in reality been paid \$9,630,349.12 by the Government, VTM has received excess payments of \$681,443.64 ($= \$9,630,349.12 - \$8,948,905.48$). That excess amount should be refunded in the first installment.
- (20) After VTM's adjustment, the remaining amount to be paid by the government would be \$62,681,443.64 instead of \$62 million. Per the POA – Class 50, 50% of this amount is \$31,340,721.82. This amount of \$31,340,721.82 could then be allocated to the plants based on the Court allocation factors of 72.310318% and 27.689682%. This would result in \$22,662,575.61 to be paid to Suiza and \$8,678,146.21 to be paid to

VTM in five installments. These amounts correspond to five equal installments of \$4,532,515.12 to Suiza and \$1,735,629.24 to VTM. To correct the excess payments received by VTM to date, a deduction of \$681,443.64 should be applied to VTM's first installment. This would result in one installment of \$1,054,185.61 ($= \$1,735,629.24 - \$681,443.64$) followed by four installments of \$1,735,629.24 for VTM.

Solution 3

- (21) Lastly, the Government could make a lump sum payment to Suiza which results in Suiza having received its Court allocation amount out of the total paid. If the payments to VTM to date of \$9,630,349.12 were to represent 27.689682% of a hypothetical total amount paid by the Government to the plants, 100% of this amount would be equal to \$34,779,558.39. The corresponding payment to Suiza would be \$25,149,209.27 ($= \$34,779,558.39 - \$9,630,349.12$). Since Suiza has in reality been paid only \$23,369,650.88 by the Government, the correct allocation of payments would be achieved by the Government issuing a lump sum payment to Suiza of \$1,779,558.39 ($= \$25,149,209.27 - \$23,369,650.88$).
- (22) After the lump sum payment to Suiza, the remaining to be paid by the government would be \$60,220,441.61 instead of \$62 million. Per the POA – Class 50, 50% of this amount is \$30,110,220.80. This amount could then be allocated to the plants based on the Court allocation factors of 72.310318% and 27.689682%. This would result in \$21,772,796.41 to be paid to Suiza and \$8,337,424.39 to be paid to VTM in five installments.

Unsworn Affidavit of Leonardo Giacchino, Ph.D.

I declare under penalty of perjury that the foregoing information is true and correct.

Executed in Bethesda, MD, on this 15th day of June, 2021.

A handwritten signature in blue ink, appearing to read 'L. Giacchino', with a large, stylized loop at the end.

Dr. Leonardo Giacchino
Partner
Solutions Economics, LLC

Correction of Mathematical Mistake in Allocation of Government Payments between Suiza and VTM

The payments made by the Government of Puerto Rico to the processing plants to date are shown in **Table 1** below. The total paid by the Government of Puerto Rico to both plants is \$33 million, which leaves a remaining balance of \$62 million.

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As part of the 2013 Settlement Agreement, the Government of Puerto Rico agreed to pay \$95 million to the fresh milk processing plants. The portion of this amount to be paid to Suiza is 72.310318% and the portion of this amount to be paid to Vaquería Tres Monjitas (VTM) is 27.689682%, resulting in an amount to be paid to Suiza of \$68,694,802.10 and an amount to be paid to VTM of \$26,305,197.90.

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This discrepancy is largely due to the October 2020 payment, in which the Government paid \$1,000,000 each to both Suiza and VTM, an allocation of 50% to each plant, which is not in compliance with the Judgement in Federal Court, which indicates that Suiza should have received 72.310318% of a total payment by the Government and VTM 27.689682%.¹

If the Government of Puerto Rico is to pay 50% of the remaining \$62 million balance, a sum of \$31 million, to allocate this amount using the Court allocation factors would continue the imbalance simply because one payment was made with an improper allocation. There are 3 possible ways to rectify this issue.

¹ Before the October 2020 payment, the Government of Puerto Rico also underpaid Suiza in earlier payments based on erroneous rounding of the 72.310318% allocation factor. These amounts are not significant but are taken into consideration in the solutions below so as to reach mathematical exactitude.

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Since VTM has in reality been paid \$9,630,349.12 by the Government, VTM has received excess payments of \$681,443.64 ($= \$9,630,349.12 - \$8,948,905.48$). That excess amount should be refunded in the first installment.

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Solution 3

Lastly, the Government could make a lump sum payment to Suiza which results in Suiza having received its Court allocation amount out of the total paid. If the payments to VTM to date of \$9,630,349.12 were to represent 27.689682% of a hypothetical total amount paid by the Government to the plants, 100% of this amount would be equal to \$34,779,558.39. The corresponding payment to Suiza would be \$25,149,209.27 ($= \$34,779,558.39 - \$9,630,349.12$). Since Suiza has in reality been paid only \$23,369,650.88 by the Government, the correct allocation of payments would be achieved by the Government issuing a lump sum payment to Suiza of \$1,779,558.39 ($= \$25,149,209.27 - \$23,369,650.88$).

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